In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney
of Cook County, Illinois,
Appellant,

VS.

ROY BROWN, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION OF PACIFIC LEGAL FOUNDATION AND CLYDE W. CORNELL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CLYDE W. CORNELL IN SUPPORT OF APPELLANT

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Pursuant to this Court's Rule 42, Pacific Legal Foundation (PLF) and Clyde W. Cornell hereby respectfully move the Court for leave to file their brief amicus curiae bound with this motion. Consent was sought from counsel for appellees who responded in the negative. Amici have received the written consent of counsel for appellant which has been lodged with the Clerk.

The accompanying brief urges this Court to reverse the decision of the Seventh Circuit Court of Appeals in *Brown v. Scott,* 602 F.2d 791 (7th Cir. 1979).

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of the State of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

Pursuant to Board authorization, PLF is currently representing agricultural employee Clyde W. Cornell in actions before the California Agricultural Labor Relations Board and the First District Court of Appeal for the State of California. Both actions were taken as a result of mass labor picketing which occurred at Mr. Cornell's home in Salinas, California, on Sunday morning, April 29, 1979. Nearly 40 members of the striking United Farm Workers of America marched, screamed, and yelled obscenities in front of Mr. Cornell's home terrifying his family and disrupting the tranquility of the entire neighborhood. Before the demonstration was ended by the police, 13 picketers had been arrested. The administrative and judicial actions taken on behalf of Mr. Cornell by PLF were initiated in an attempt to ensure that Mr. Cornell and his family would never again have the privacy and sanctity of their home so flagrantly violated.

PLF and Mr. Cornell strongly believe that municipalities must be permitted to adopt narrowly drawn statutes to protect their citizens' rights to privacy in their homes. Otherwise, brutal occurrences as that above referenced will continue. Accordingly, amici believe the action of the court below in setting aside the Illinois residential picketing statute will severely affect the general welfare of the people of this nation.

Amici consider the decision to be extremely significant as it interferes with the citizen's fundamental right to privacy in the home and the state's compelling interest in protecting that right.

Past Supreme Court decisions as well as federal and state court decisions have recognized and protected this fundamental right to privacy in the home when confronted with uninvited speech. The state's compelling need to protect both the right to privacy and right to free speech is undeniable; yet neither right is absolute. When these rights conflict, they must be weighed and balanced by the courts. It is the opinion of amici that the constitutionally protected privacy right in the home is superseding and, as such, was not properly considered or weighed. If it had, the court would have ruled the right to privacy in the home so compelling as to sustain the state's interest in adopting the subject statute.

PLF and Clyde W. Cornell, due to their unique perspective and experience concerning the protection of residential privacy interests, believe that they can provide this Court

with a more complete argument on the need to balance the important public interests at stake in this litigation.

DATED: February 21, 1980.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 602 F.2d 791 (7th Cir. 1979).

The opinion of the district court is reported at 462 F. Supp. 518 (N.D. Ill. 1978).

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for nonresidential public purposes.

ARGUMENT

THE CIRCUIT COURT COMMITTED CLEAR ERROR WHEN EVALUATING THE CONSTITUTIONALITY OF THE ILLINOIS RESIDENTIAL PICKETING STATUTE BY FAILING TO ASSIGN SUPERSEDING IMPORTANCE TO PROTECTION OF THE RIGHT OF PRIVACY IN THE HOME

The Illinois residential picketing statute at issue manifests the recognition of the state that protection of privacy in the home constitutes a compelling state interest which only the state has the serious capability and responsibility of ensuring by invoking its police powers. *See Kovacs v. Cooper,* 336 U.S. 77, 87 (1949). Amici emphatically assert that it is imperative that the state be permitted to exercise its responsibility to protect the residential privacy of its citizens, for without safeguarding statutes a resident is subject to the same frightening treatment amicus Cornell was subjected to when picketed by the United Farm Workers. *See* motion, *infra.*

Ironically, though, in exercising its protective police powers designed to ensure the privacy rights of its residents, the state is faced with a dilemma. On the one hand, it is warned not to draw the statute so broadly that other constitutional guarantees are impermissibly violated in the process. For example, the right to free speech must not be needlessly diminished when a narrower statute can adequately serve the same paramount governmental interest of protecting privacy. *See Martin v. Struthers,* 319 U.S. 141 (1943). On the other hand, the state is warned that if it does draw a statute narrowly so that due regard is given to all constitutional guarantees to ensure that none

is needlessly diminished in the process, the statute runs the risk of violating the Equal Protection Clause of the Fourteenth Amendment. *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972), bears witness to this fact. Illinois is caught in this dilemma by the judicial reasoning appealed from herein. Fortunately, the dilemma is artificial and avoidable, for the court should have allotted superseding weight to protection of residential privacy rights when it balanced the constitutional interests impacted by the statute. The right of privacy in the home has been accorded superseding weight by the courts when balanced against conflicting rights; yet the lower court totally ignored this precedence. This is clear error.

The right to privacy was firmly established as a constitutionally protected right by the Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Court articulated the "penumbra" of privacy rights found in the Constitution:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Griswold,* 381 U.S. at 484.

The right to be free from invasion of privacy encompasses the right to have one's home, family, and communal life protected from disruption. A clear line of case authority demonstrates that the privacy and sanctity of the home are to be given the highest safeguards against intrusive speech in a variety of factual settings.

In *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970), this Court upheld the constitutionality of a federal statute which permitted a resident to have his name removed from mailing lists thereby prohibiting mail houses from sending mailings to the resident's home if the subject matter of the mailings was found by the resident to be sexually offensive. Chief Justice Burger stated in his opinion:

> "Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan,* 397 U.S. at 736-37.

In explaining his opinion, the Chief Justice continued:

> "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.
>
> ....
>
> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow

> of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Rowan,* 397 U.S. at 737-38.

In an earlier case, *Kovacs v. Cooper, supra,* this Court upheld an ordinance prohibiting the use of sound trucks emitting "loud and raucous noises," reasoning that a person in his home or even in the street is particularly helpless to escape interference with his privacy except through protection of the municipality. *Kovacs,* 336 U.S. at 87.

In addition, the Court stated:

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within the constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs,* 336 U.S. at 83.

In *Breard v. Alexandria,* 341 U.S. 622, 625-26 (1951), this Court, in upholding a municipal ordinance regulating door-to-door magazine solicitations at private residences, retained this rationale, noting:

> "that opportunists . . . cannot be permitted to arm themselves with an acceptable principle, such as . . . a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose."

In commenting on the effects of unregulated picketing, Justice Black in his concurring opinion in *Gregory v. City*

of Chicago, 394 U.S. 111 (1969), emphasized that the family home should be protected:

> "And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory*, 394 U.S. at 125-26.

Many other federal and state decisions also have determined residential picketing to be disruptive of the feelings of well-being, tranquility, and privacy that one is entitled to enjoy in his home and, thus, subject to prohibition or regulation. These cases have held that regulation is not an infringement of the First Amendment right to free speech in that the restriction of picketing and concomitant speech is in furtherance of a legitimate and substantial state interest—protection of the right of privacy. *See City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971);

State v. Zanker, 179 Minn. 355, 356, 299 N.W. 311 (1930); *State v. Perry*, 196 Minn. 481, 482, 265 N.W. 302 (1936); *Pipe Machinery Co. v. De More*, 76 N.E.2d 725, 727 (1947); *Hebrew v. Davis*, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (1962); *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

As established by these cases, the right of privacy in the home is a clearly favored right in both federal and state courts. Significantly, this right of privacy may be protected from intrusive and disruptive speech through the regulatory efforts of states and municipalities.

In deciding *Brown v. Scott*, 602 F.2d 791 (7th Cir. 1979), the Seventh Circuit gave no consideration to the purpose of the statute involved—the protection of the privacy of the home. The court treated the statute as simply one more instance of conflict between the police power of the state and the First Amendment rights of individuals. The court merely stated that the rights affected by the picketing statute in *Mosley* were the same as those in *Brown*. *Brown*, 602 F.2d at 794. Such an analysis utterly ignores the circumstances affected by the statute and the reasons for its enactment. The statute was passed to protect the preeminent right of the citizen to the privacy of the home. The statute in *Mosley* was adopted for different purposes and to affect different circumstances. Protection of right of privacy was not in issue in *Mosley*. The failure of the court below to fully recognize and consider the special circumstances affected by the statute and the special reasons for which it exists is certain error. As Justice Frankfurter indicated in *Kovacs:*

> "'It is imperative that, when the effective exercise of

these rights [speech] is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations.' "

The Illinois statute attempts to strike a delicate balance between the competing interests in equal protection, free speech, and privacy of the home. This approach is constitutionally appropriate.

> "A State may 'direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.' Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid 'cautious advance, step by step, and the distrust of generalities.' " *Hughes v. Superior Court,* 339 U.S. 460, 468-69 (1950) (citations omitted).

The Court of Appeal, however, rejected the considered judgment of the State of Illinois because the state had not achieved what the court considered to be a perfect balance. Moreover, the court reached its conclusion without considering the paramount importance of protecting residential privacy. The decision, therefore, fails to follow the guidance given by this Court and severely limits the ability of state and local governments to respond to the urgent need to protect the peace and security of the homes of citizens such as amicus Cornell.

CONCLUSION

The court in *Brown* stated in summary:

> "Our holding implies neither disparagement of the important state interest in protecting the peace and privacy of the home nor an opinion that the state may not prohibit or regulate residential picketing in a manner consistent with the equal protection clause as interpreted in *Mosley." Brown,* 602 F.2d at 795 (footnote omitted).

Regardless, the court invalidated the Illinois residential picketing statute as constitutionally infirm. However, the lower court did not evaluate the narrowly drawn Illinois statute in accordance with clear Supreme Court precedent. The court simply ignored the principal weight that is to be given a state's compelling interest to protect the right of its citizens to privacy in their homes. In balancing competing interests to determine the constitutionality of a statute specifically designed to protect residential privacy, the court considered the statute's potential conflict with the right to free speech but did not consider the substantial, superseding importance of protecting privacy in the home. Case law demonstrates that failure to balance these competing interests constitutes clear error.

For these reasons, this Court should set aside the decision of the Seventh Circuit Court of Appeals.

DATED: February 21, 1980.

Respectfully submitted,

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